Het verschoningsrecht van getuigen in civiele zaken

Summary

The right of refusal to testify in civil proceedings

In the majority of civil cases the court has to establish the facts that will be decisive for the outcome of the case. According to Dutch civil procedural law one of the parties will be given the burden of proving the facts he stated to support his point of view. In most cases the evidence brought forward will mainly or in part consist of the depositions of witnesses, to be heard before the court dealing with the case.

Correspondingly, everyone who has been summoned to appear as a witness has a legal obligation to present himself before the court, to take an oath and to give testimony. A refusal to comply with one or more of these obligations can give rise to criminal and civil liability and may engender coercive measures meant to compel the witness to fulfil his obligations. Nevertheless, some witnesses has been attributed the right to refuse to answer some or even all questions put to them, without having to fear consequences of any sort.

This right of a witness to be excused from his obligations is usually referred to as his *verschoningsrecht*, a term that has no English equivalent and can be described as 'the right to refuse to testify'. Next best is the term 'privilege', normally used to designate the right of a person to refuse to disclose information, which right applies in all kinds of situations, varying from being questioned as a witness to being subject of a search warrant. For the sake of being concise this term will be used, noting that the *verschoningsrecht* that is meant is *narrower* in the sense that it is restricted to the situation in which the person concerned is heard as a witness before a court.

This study intends to give a full and systematic description of the circumstances in which in civil proceedings privileges can be invoked successfully. This description is based on the study of the primary sources of law, i.e. legislation and jurisprudence. The law in force is criticized in case of the occurrence of inconsistencies, gaps and lack of clarity. Therefore, the actual situation has sometimes to be studied as a function of the historical developments which led to the adopted interpretation of the statutory articles concerning privileges. The results are compared with the legislation of 13 other countries of continental Western Europe.

Chapter 2 focuses on the origin and application of the first articles in which the professional privilege was codified, to wit s. 1946 of the Civil Code and s. 189 of the Code of Criminal Proceedings, both of 1838. The latter article was literally copied from the first. This focus is imposed by the fact that the actual interpretation - the outcome of a development set by a Supreme Court decision in 1913 - has very little affinity with the literal meaning of the articles in force (s. 165 Code of Civil Proceedings, s. 218 Code of Criminal Proceedings), which differ only on minor points from their 19th century ancestors. Thus legal history is taken as the starting point for a systematic description of privileges.

First it is noted that the available material gives no indication of the meaning that the then legislator attributed to the said articles. This seems a bit surprising, as both articles were new in a sense that they were not derived from rules of law which were in force before 1838. Even the drafts of the codes mentioned showed articles that largely differed from the eventually adopted text. On the other hand, their meaning is clear and could be taken at its face value. Several arguments which could be

construed in favour of a not literal interpretation have to be rejected as lacking an empirical basis or as being highly improbable. This results in the hypothesis that the intended meaning of the articles is tantamount to the literal meaning of the text, which is referred to as the *default view*. The only scholar of that period who takes another position (J. de Bosch Kemper) is only able to do so by deliberately misconstruing the history of the legislation process and by postulating an interpretation that is not warranted by any valid reason.

By means of an analysis of all 19th century legal incidents that can be associated with the professional privilege, it is shown that the *default view* was actually the *received view*, even within the circles of Supreme Court justices. At the same time developments in criminal policy that asked for judicial authorities with effective powers make it clear that the *received view* could hamper these authorities in their working in a way that could be considered as undesirable.

Anyhow, legal debate in the beginning of the 20th century (especially the 1905 meeting of the Association of Dutch Lawyers) shows that legal theory is gradually tending to a position which facilitates a narrower interpretation of the articles concerning the professional privilege. The first time the Supreme Court is called to give a judgment on this point (in 1913), it chooses a narrow interpretation, exactly the interpretation which has in fact been advocated by De Bosch Kemper nearly a century earlier (Liefdehuisarrest). According to this interpretation the professional privilege is restricted to those professionals who are bound by a pledge of professional secrecy, whose help is sought for by their clients and who can only adequately perform their duties when secrecy can be guaranteed under all circumstances. Later jurisprudence remained faithful to the then formulated principles.

This restrictive interpretation leaves open for question in which way all other pledges of secrecy must be dealt with. This explains why the privileges in general are largely determined by the decisions of the Supreme Court, which resorted to a rather complicated, more or less layered system in an attempt to cover all possibilities in an acceptable way..

Chapter 3 starts with an overview of the outcome of jurisprudential and legislative activities until now. This overview provides a structure in which all privileges and related rights can be fitted.

Firstly the privilege for relatives has to be distinguished. Since 1838 it has always been part of the by law accorded privileges and it underwent very few changes since. It can be studied seperately from the other privileges. The same applies to the *nemo tenetur* privilege, which has only since 1988 been provided for by civil law.

The professional privilege is largely jurisprudential as a result of the developments described in chapter 2. Moreover, the Supreme Court proclaimed it in 1985 as a principle of Dutch law with a general scope, thus having implications for all procedures and situations in which information has to be obtained from professionals who have the right to invoke this privilege. As to be expected from these consequences, only a limited number of professions enjoys this privilege. This is compensated for by a new privilege created by the Supreme Court. In this book this privilege is coined after the first judgment in which it is mentioned (*Happy Family* privilege).

In the course of the years the legislator has taken several explicit or more or less implicit measures to secure the secrecy of specific information. The persons concerned (in most cases civil servants) are bound by a pledge of secrecy and are sometimes exempted from certain obligations to reveal that information to others. The Supreme Court approach excludes them from the professional privilege. A case to case study is therefore necessary to decide whether a particular pledge of secrecy implies a privilege. If so, this is referred to as a *lex specialis* privilege.

As these categories leave a number of cases in which the claim of secrecy is by all means reasonable, but still not covered, the Supreme Court indicated that the court could always, if it deems necessary to do so, make use of its power to prevent the answering of specific questions put to a witness. This is referred to as the incidental privilege.

The rest of the chapter forms the core of the book and concerns the detailed description of each of these categories. In each case the ratio of the privilege is described, as well as its relation to the other privileges, its scope, its legal character, the persons concerned and the accepted exceptions.

The description of the privilege for relatives (provided for in s. 165 ss. 2a Code of Civil Proceedings) concentrates in the first place on a detailed analysis of parts of family law. Recent changes in family law have complicated the question whether there is kinship to a certain degree between two persons. To cover all complications often an analysis of the history of a particular statute is unavoidable. Eventually a conclusion can be reached on all issues that arise.

In the second place it turns out to be inevitable to study the legal concept of a 'party' involved in legal proceedings, since the privilege of relatives is attributed to persons who are family of a party. This notion is analysed with the help of older jurisprudence on similar questions. It is found that especially the identification of persons in charge with the moral person for which they are employed, leads in some cases to an unjustifiable outcome.

The interpretation of the exceptions to this privilege (s. 284 ss. 3 Code of Civil Proceedings) turns out to be cumbersome. The history of these exceptions is traced from the outset and shows an almost diabolical succession of misunderstandings and legislative carelessness. A sensible interpretation of this article therefore has to be based on an analysis of the problem concerned as a whole and cannot be derived from the remarks the legislator made in the course of events.

The Supreme Court created an exception in case the witness is a party to the legal proceedings himself. This decision turns out to be based on a misreading of the preparatory proceedings of the law in question and cannot be endorsed by any reasonable argument.

The *nemo tenetur* privilege gives rise to similar questions as the privilege for relatives, since s. 165 ss. 3 Code of Civil Proceedings uses the same wordings as s. 165 ss. 2a of the same Code. Most interesting in this case is the scope of the privilege, since the legislator chose to restrict this to crimes, excluding misdemeanours. It appears that the reasoning followed cannot be upheld in the light of other regulations. Nevertheless, the wordings of the law exclude a jurisprudential solution.

This privilege has been extended to cases that are not covered by the wordings of the law, especially to bankruptcy hearings. The Supreme Court argued that in that case the loophole in the legal articles should be filled by referring to the civil counterpart of this privilege and not the criminal counterpart. It is shown that this view is historically and materially incorrect.

The professional privilege is in most cases the only privilege that is studied in more detail. The cause can be found in the jurisprudential turn the Supreme Court took in 1913 by giving an interpretation that could not be justified by the wordings, legal history or thitherto application of the article. This jurisprudential turn made the relation between the pledge of professional secrecy and the professional privilege especially problematic. It is argued that the only solution can be found in separating these categories completely in a sense that there is no legal relevant relation between them. Invoking or not the privilege does not affect the question whether or not the pledge of professional secrecy can be violated, neither can the existence of a pledge of professional secrecy be decisive for the question if the privilege exists or can be invoked. It is shown that a logically sound system results which can account for the outcome of the decisions of the Supreme Court, although admittedly the Supreme Court itself is not always consistent in its distinctions. In this system the waiver of secrecy by the client, which does not affect the professional privilege, can be explained without any problem.

The overview of the professionals concerned starts with a rather new approach in distinguishing four circles of professional assistance that emerge from the corpse of legal decisions and can be associated with the principles formulated by the Supreme Court in the Liefdehuis- and Notaris-Maas-judgments (legal, (para)medical, spiritual-social and notarial circle). Using this concept most decisions can be accounted for, whereas in some cases doubts have to be casted as to their correctness. The chosen approach has the merit of allowing a coherent overview. Special attention is given to the assistants of the professionals concerned, who enjoy a *derived* privilege.

Since the professional privilege is associated with a certain profession, the law limits the existence of the privilege to professional activities of the persons concerned. Jurisprudence on this issue is related to the character of the specific activity and needs therefore to be described for each of the circles of professional assistance separately. The scope of the privilege depends in a similar way on the charachter of the profession concerned. Lawyers and notaries additionally have to take in account the elaborated exceptions that were made up by the Supreme Court in case they assisted at negotiations preceding a contract. A category of exceptions for all circles, occurring in what the Supreme Court indicates as 'very exceptional circumstances', has no practical meaning in civil cases.

According to recent Supreme Court decisions the professional witness who is a party to the legal proceedings himself, keeps the right to invoke his professional privilege. The problem is studied in more detail and although in general the Supreme Courts decision gives a satisfactory result, an approach taking heed of the procedural obligations of a party, would have given a fairer outcome.

The study of the *lex specialis* privilege pretends to be exhaustive in a sense that all relevant statutory pledges of secrecy are taken into account. They are ordered into groups depending on their wording, intention and content. In this way some general conclusions can be drawn as to whether or not these pledges of secrecy imply a privilege. However, legislatory gaps pop up everywhere, leaving an image of disorder and arbitrariness.

The paragraph is extended to articles that could arguably be associated with some sort of privilege. At the end the position of the constitutional King is analysed, leading to the conclusion that he is exempted from the duty to be a witness as a consequence of his constitutional position.

The *Happy Family* privilege hitherto has found only one instance in which the person concerned could invoke the privilege, i.e. a doctor at an advice centre in connection with the identity of the persons who brought something to his attention. This instance is extended to some other cases that could arguably meet the criteria set by the Supreme Court. Since there is very little literature and jurisprudence, legal theory on this subject has still a summary character.

The *incidental* privilege has in the first place to be construed as a right and not as a favour given by the court. This is the only way the Supreme Court decisions can be interpreted, since it indicated that along this line problems can be met that concern the pledge of secrecy and similar interests of police agents, secret services and scientific researchers.

The distinguishing feature in relation to the other privileges is the fact that in these cases the judge has to take in account all circumstances of the case, which are relevant for his final decision. The witness has to justify why he is entitled to remain silent, whereas the parties can put forward everything that sheds another light on the claims of the witness. In all other cases the circumstances of the case do not play any role; if the criteria for invoking the privilege are met, the judge is obliged to allow the witness to ignore the question(s) posed.

Rather surprisingly the privilege of the press has to be construed as an incidental privilege too. Their privilege can only be accepted if the balance between the interest of finding the truth and the interest of protecting their sources tips in their favour. That depends on the actual interests at stake and cannot be decided in advance for all cases. The same applies to police officers.

The last paragraph of chapter 3 gives an overview of all procedures in which the rules governing standard civil procedures with regard to privileges have to be applied. In most cases this is clear, in some cases not. Among the latter are the summary proceedings of s. 254 Code of Civil Proceedings. In respect of former changes of the law the conclusion is drawn that the privileges described in this book have to be respected in these summary proceedings as well.

Chapter 4 bears upon the procedural implications of the privileges described. These implications are described in a more or less chronological order, starting with the information to be supplied by the court before hearing the witness.

The straightforwardness of this approach, relying on the hitherto correct assumption that the privilege can only be invoked in court, is disturbed by a recent judgment of the Supreme Court, in which the witness was given the right to put forward his arguments in favour of his privilege in writing before the actual hearing. The judgment is discussed in detail, resulting in the conclusion that it is not in accordance with existing law and jurisprudence and needs therefore to be treated as exceptional if not erroneous.

Some clear guidelines are set for the judge hearing a witness. These guidelines are derived from the actual legislation and the principle that the rights of witnesses should be respected by the courts, that therefore should abstain from any action that would amount to taking advantage of the ignorance of the witness.

The Dutch legislator always neglected the status of decisions made during hearings, and this affects the decisions made in response to the claim of a privilege as well. The various aspects of those decisions (content, formalities, formulation, the act of its rendering) are dealt with in a systematic way. The existing confusion with regard to legal remedies is only partly solved by the Supreme Court. Solutions are proposed for the remaining lacunas.

The admissibility of evidence when a privilege is involved had been subject of various, but not very congruous decisions. The different aspects of this question are analyzed and solved.

The last paragraph concerns the complications that arise when parties stay anonymous. Jurisprudence has not reached a final point yet, but taking the ratio of the privilege as a starting point it can be argued that a claim to this privilege has to be accepted if the witness establishes a probability of the required relation between him and the anonymous party.

Chapter 5 compares the Dutch law concerning privileges with the legislation (as interpreted by some leading cases if necessary) of the other countries of continental Western Europe. The common law countries are excluded, because only choices made by the national legislator are the object of comparison. The same counts for Switzerland, where the law of civil proceedings is a matter of cantonal interest.

The comparison is made by taking some topics that concern the means chosen by the legislator, the scope of the privileges and some problems that specifically occupied the legal debate in the Netherlands. The comparison shows that most legislators are more concerned with giving explicit rules than the Dutch and chose techniques which are perfectly suited to avoid the rigidness so often associated with fixed rules. As far as the scope of privileges is concerned, the Netherlands in most cases have taken resort to a rather frugal approach, thus showing little comprehension for the moral and professional dilemmas standing as a witness could bring along.

Chapter 6 concludes that the Dutch legislator should be more active and precise in this field and should try to establish a general statute on the hearing of witnesses. A list is made of problems that should be covered and in the preceding chapters some more concrete proposals can be found. The system adopted by the Danish legislator is recommended as an example. The Danish law gives some freedom to the judge in certain areas, but defines clearly in which cases no privilege can be invoked and in which cases it can be invoked without any restriction. This tech-

nique can be used to set clear guidelines which avoid rigidness and nevertheless allow to make choices which should be the concern of the legislator.